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No. 85-51

In the Supreme Court of the United States

OCTOBER TERM, 1985

HELEN M. RANDLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges the concurrent findings of the courts below that she was not in custody at the time she confessed and that, even if she were, her earlier waiver of *Miranda* rights remained effective.

1. Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy, in violation of 18 U.S.C. 371. She was sentenced to concurrent terms of three years' probation and fined a total of $4,000. The court of appeals affirmed in an unpublished decision (Pet. App. A1-A6; 765 F.2d 147 (Table)).

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner conspired to stage the theft of her automobile in order to sell the car and also collect the

insurance proceeds. Unknown to the conspirators, however, the purchaser of the automobile was an undercover agent of the FBI. On the same day that her co-conspirators sold the car to the agent, petitioner reported that it had been stolen. She filed an insurance claim shortly thereafter and collected $9,000. See, *e.g.*, Tr. 93-122, 149-160, 233-235, 321-322, 368.

2. a. Prior to petitioner's indictment on June 14, 1984, her three co-conspirators pleaded guilty. Two of them implicated her in the crime, but the third, with whom she had lived for 15 years, denied that she was involved. FBI agent William Hindon interviewed petitioner in her office where, after being advised of her rights, petitioner denied advance knowledge of the theft (Tr. 227-228). Hindon asked at this meeting and a later one if petitioner would be willing to take a polygraph examination; he and another agent encouraged her to discuss the matter with her attorney (Tr. 49-50, 229-230). Petitioner agreed to take the test but later postponed the date because she "had not been able to talk to her attorney face to face" about it (Tr. 230).

On the rescheduled date of the examination, May 11, 1984, Agent Hindon met petitioner at the FBI office and introduced her to Agent Richard Racleff, the polygraph operator (Tr. 53). After Hindon left, Racleff explained to petitioner that the interview would cover her possible involvement in the staged theft (Tr. 314-315). He told her that "she was free to leave at any time" and that "if she needed to talk to [her attorney] at any time, she was free to call" (Tr. 316). Petitioner signed an advice-of-rights form and a consent to the polygraph examination (Tr. 34-35).

After the examination, which lasted approximately 75 minutes (Tr. 34-35), Hindon returned to the room and questioned petitioner further in Racleff's presence. She acknowledged that she had advance knowledge of the

staged theft, that she removed her personal items from the car the night before it was taken, and that she knew that a bogus insurance claim would be filed (Tr. 233-235, 320-322).

b. Following a hearing, the district court denied petitioner's motion to suppress the statement that she made immediately after the polygraph examination (C.A. App. 19). The court found that petitioner "had no reasonable belief that she was in custody" and that "[e]ven if [her] statements were made in response to custodial interrogation," petitioner was advised of her rights and "voluntarily waived [them] prior to making the incriminating statements." *Ibid.*, citing *Wyrick* v. *Fields*, 459 U.S. 42 (1982).

3. The court of appeals affirmed in an unpublished opinion (Pet. App. A1-A6). It upheld the district court's finding that petitioner was not in custody (*id.* at A5). It also agreed with the district court that, under this Court's decision in *Wyrick* v. *Fields*, *supra*, petitioner's pre-examination waiver was effective with respect to her post-examination statement because the surrounding circumstances had not significantly changed between the time that she waived her rights and when she confessed a short while later (Pet. App. A5-A6).

4. Petitioner contends (Pet. 9-12) that she was in custody when she made her statement to Hindon and Racleff and that the agents should have warned her again of her *Miranda* rights because of the "extreme change of circumstances" (Pet. 11) that transpired between her waiver before the polygraph interview and the subsequent questioning. These factbound claims were correctly rejected below. In view of the concurrent findings of the district court and the court of appeals, review by this Court is unwarranted. See, *e.g.*, *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967).

Petitioner was not in custody for purposes of *Miranda* because she was not subjected to " 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.' " *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983), quoting *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977). Petitioner had been neither charged nor arrested; she appeared voluntarily after consulting with counsel; and she was expressly advised, contrary to her testimony at the suppression hearing on which she now relies (Pet. 4, 10), that she was free to leave at any time (Tr. 316). *United States* v. *Gillyard*, 726 F.2d 1426 (9th Cir. 1984), cited by petitioner (Pet. 9), is not to the contrary. There, unlike here, the defendant was not represented by counsel and was not advised that he had the right to stop questioning and leave at any time (726 F.2d at 1428, 1429).

In any event, petitioner's express waiver of rights prior to the polygraph examination remained effective. Only a "serious[]" (*Wyrick* v. *Fields*, 459 U.S. 42, 47 (1982)) change of circumstances following conclusion of a polygraph examination can vitiate the validity of an earlier waiver: the Court expressly rejected in *Wyrick* (*id.* at 48-49) a per se rule requiring the police to readvise a "suspect of his rights before questioning him at the same interrogation about the results of [a] polygraph." Petitioner, like the defendant in *Wyrick* (*id.* at 44), waived her rights after being advised before the polygraph that she would be questioned about a specific crime and that she had the right to stop the questioning at any time. The continuation of questioning about the staged theft by Agent Hindon, who had arranged the polygraph, introduced petitioner to Agent Racleff, and took her statement in Racleff's presence immediately following the examination, hardly constitutes a change in circumstances so serious as to give rise to a requirement that new warnings be administered. Again, petitioner's reliance

(Pet. 10) on *United States* v. *Gillyard, supra,* is misplaced. There, unlike here, the defendant was not advised that he would be questioned about a specific crime and post-polygraph "accusatory questioning" was conducted by officers "who had nothing to do with the polygraph examination" (726 F.2d at 1429). Moreover, the court of appeals there held only that the district court's finding that the circumstances had changed sufficiently to require a new warning was not clearly erroneous; it stated that the district court could have found a valid waiver under the circumstances before it (*id.* at 1429-1430).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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